IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

Criminal Revision No.2407 of 2004

Date of Decision: March 01, 2007

Daljit Singh

...Petitioner

VERSUS

Jagjit Singh

...Respondent

Present: Mr.P.L.Singla, Advocate,
for the petitioner.

None for the respondent.

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The petitioner has filed this revision against the order passed by Addl.Sessions Judge, Moga, whereby he has set-aside the order of the Judicial Magistrate Ist Class, Moga recalling the order dismissing the complaint of the petitioner in default.

The petitioner filed a complaint under Section 138 of the Negotiable Instruments Act and order summoning respondent was made on 11.1.2001 for 2.3.2001. The notice was to issue to the respondent on deposit of process fee, but the fee was not deposited. The petitioner noted the wrong date as 5.3.2001 instead of 2.3.2001 to which date the case was adjourned. On account of non-presence of the petitioner, the complaint was dismissed in default. The order in this regard is re-produced below:-

> "Complaint called so many times but none has come present on behalf of complainant. It is already 3.45 p.m. Hence this complaint is dismissed for want of prosecution. File be consigned."

On an application filed by the petitioner, the Magistrate restored the complaint vide his order dated 10.9.2001, summoning the respondent for 13.10.2001. The respondent, however, filed an application for dismissing the complaint pleading that the Magistrate would not have any power to recall the order passed by him dismissing the complaint in default. The said application was also dismissed on 11.10.2002. Against this, the respondent filed a revision before Addl.Sessions Judge, Moga who, vide his order dated 23.8.2002, has accepted the same and has set-aside the order passed by the Magistrate. Addl.Sessions Judge has, however, up-held the order, whereby the Magistrate had refused to review the order recalling his earlier order dismissing the complaint in default. Still, the Addl.Sessions Judge, taking suo-moto notice in the revision, set-aside the order of restoration passed by the Magistrate holding that said order suffered from patent illegality and that remedy against the same was by way of appeal or revision and not a review or recall by the Magistrate. While so holding, Addl.Sessions Judge, also observed that the complainant, if so advised, can file a second complaint as is permissible under law. This order is now impugned in the present revision petition.

Notice of this revision was issued. Service is complete. No none has put in appearance on behalf of the respondent.

The counsel for the petitioner submits that this is a case where Magistrate, though issued summoning order, but the notice was issued due to non-filing of process fee and hence the provisions of Section 256 Cr.P.C. would not come into play. The counsel has also relied upon Indocon Micro Engineers Vs. Pine Technology

P.Ltd., 2003 (3) R.C.R.(Criminal) 695 to say that where the complaint is dismissed in default at the pre-summoning stage, the same can be restored even without issuing of notice to opposite party. In this very case, the court had further held that where the complaint is dismissed in default and restoration is filed on the ground that there was a mistake in noting of the date of hearing, it would be a fit case for restoring the complaint. The counsel for the petitioner, while referring to the impugned order, would also say that even if the Addl.Sessions Judge, Moga was of the view that Magistrate had no power to recall his earlier order and the appeal or revision was the appropriate remedy, he should have, while exercising suo-moto power, done justice by setting-aside the order dismissing the complaint in default instead of passing the order, which has resulted in allowing the illegality to perpetuate. The counsel has also referred to case of Smt.Rajeshwari Vs. H.N.Jagadish, 2002(1) R.C.R. (Criminal) 111 to urge that the second complaint under Section 138 of the Negotiable Instruments Act would not be maintainable. It is further noticed in this case that the Magistrate after dismissing the complaint in default becomes a functus officio and would have no jurisdiction to recall the order.

I see justification in the submissions made by the counsel for the petitioner. The petitioner filed a complaint under Section 138 of the Negotiable Instruments Act as a cheque issued by the respondent stood dishonoured. The petitioner filed application, duly supported by material indicating that he could not appear on 2.3.2001 as he had noted the date wrongly. Considering this averment made on behalf of the petitioner to be correct, the

Magistrate had recalled the summoning order. Though in Smt.Rajeshwari's case (supra), it is held that the Magistrate has no jurisdiction to recall his order, but it is further held that under inherent power, the High Court after examining the facts can grant equitable relief. Hon'ble Supreme Court in Associate Cement Co.Ltd. v. Keshav Anand, 1998(1) RCR (Criminal) 309= 1998 Crl.L.J.856 has held that resorting to steps of axing down the complaint may not be proper exercise of power if the presence of complainant on the day the complaint is dismissed is unnecessary. This Court in Sant Lal Bhatia Vs. City Credit and Leasing Company, Hisar, 2002(3) R.C.R. (Criminal) 250 observed that efforts of the trial Magistrate should be to dispose of cases on merits instead of dismissing them in default.

Accordingly, the impugned order passed by the Addl.Sessions Judge, Moga cannot be sustained. The same is set-aside. For the sake of clarity, it is further held that the order passed by the Magistrate dismissing the complaint in default would also stand set-aside and the complaint filed by the petitioner would stand restored to the same position. The Magistrate is directed to take up the case for further proceedings after due notice to the parties concerned.

The petition is disposed of accordingly.

March 01, 2007 (RANJIT SINGH)
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